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Office of Administrative Law Judges
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Issue Date: 28 August 2003

Case No.: 2002-LHC-01658

OWCP No.: 02-127246

IN THE MATTER OF

ROBERT J. BILLS,
Claimant

v.

SCIENCE APPLICATIONS INTERNATIONAL CORP.,
Employer, and

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA/AIG WORLDSOURCE,
Insurer.

DECISION AND ORDER AWARDING BENEFITS

This case arises from a claim for compensation brought under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. 901, *et seq*., hereinafter referred to as the "LHWCA" or the "Act" and the implementing regulations, 20 C.F.R. parts 701 and 702. The Act provides compensation to certain employees (or their survivors) engaged in maritime employment for occupational diseases or unintentional work-related injuries, irrespective of fault, occurring upon the navigable waterways of the United States or certain adjoining areas, resulting in disability or death. With limited exceptions, the Act provides the exclusive remedy for such injuries against maritime employers which have secured the payment of benefits. See 33 U.S.C. 905(a). By extension through the Defense Base Act, 42 U.S.C. 1651, *et seq*., the Act also provides compensation coverage to civilian employees engaged in overseas public work of the U.S. government or its allies such as in this claim. This claim was brought by Robert J. Bills (Claimant) against Science Applications International Corp.(SAIC or Employer), and its carrier, Insurance Company of the State of Pennsylvania/AIG Worldsource, arising from injuries received by claimant in an automobile accident which occurred in the course and scope of claimant's employment as a police instructor for the Employer on January 31, 2000, near Vushtri, Kosovo.

On April 17, 2002, 2002, the Director, Office of Workers' Compensation Programs (OWCP), referred this case to the Office of Administrative Law Judges (OALJ) for a hearing. The case was assigned to me in November 2002. A formal hearing was held before the undersigned on April 24, 2003, in Colorado Springs, Colorado, at which the parties were given a full and fair opportunity to present evidence and argument. Administrative Law Judge Exhibits ("AX") 1-4, Claimant's Exhibits ("CX") 1-6, and Respondents Exhibits ("RX") 1-14 were admitted into the record without objection. The parties were granted until June 20, 2003 to file Post Trial Briefs.

STIPULATIONS

The parties stipulate and I find:

1. An employer/employee relationship existed as between Claimant and employer during the relevant periods.

2. Coverage under the Act exists as to the claim against the employer.

3. The claim was timely noticed and filed.

ISSUES

The issues remaining to be resolved are:

1) Whether Claimant's average weekly wage should be calculated under Sections 10(a) or 10(c) of the Act.

2) Claimant's post-injury earning capacity.

3) Proper amount due for scheduled injury to Claimant's right leg.

4) Whether Claimant is entitled to an award for disfigurement under Section 8(c)(20) of the Act.

5) Whether Respondents are subject to a Section 14(e) penalty.

6) Assessment of attorney fees and costs pursuant to Section 28(b) of the Act, if any.

7) Interest on past due benefits, if any.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Summary of the Evidence

Claimant was injured on January 31, 2000, while employed by SAIC as a police instructor when he was a passenger in a van which was taking him from his quarters to the Employer's training site at a police school in Kosovo. He sustained a laceration to his face as well as right shoulder and right leg injuries. He was flown back to the United States for treatment and was eventually treated by Dr. William Ciccone, II, in Colorado Springs, Colorado. Dr. Ciccone diagnosed a right shoulder posterior fracture dislocation and right tibial plateau fracture (CX 1 at pp. 15, 17). Claimant also had right rotator cuff damage, partial tear of the biceps tendon, injury to the thoracic spine, a pressure sore in the fracture of the right leg, and a pressure ulcer and deep venous thrombosis in the right leg (CX 1 at pp. 28, 30; RX 13 at pp. 9-10, 130). Following surgery to his shoulder and leg and a lengthy period of convalescence, Claimant returned to work upon his release by Dr. Ciccone on October 23, 2000 (RX 7 at p. 11; Hearing Transcript ["HT"] at p. 34). He continued to work until November 2, 2001, when his employment contract with SAIC came to an end (HT at pp. 24, 112-114). Claimant did not renew his contract with SAIC because SAIC was reducing its operations and no positions for Claimant were available (HT at pp. 118-121). Claimant returned to his home in Colorado Springs, Colorado rejoining his wife, children and grandchildren (HT at pp. 114-116). Upon returning to Colorado, Claimant remained unemployed until he was employed as a police dispatcher for the Aurora Colorado Police Department at a salary of $34,465.00 per year from May 20, 2002 through November 8, 2002 when he was laid off (HT at p. 15). In September of 2002, Respondents initiated vocational rehabilitation services through vocational expert, John Drew, who met with Claimant and assisted Claimant in another aggressive job search upon his being laid off in November 2002 (RX 8). On January 6, 2003, Claimant began employment as an investigator with Progressive Insurance Company of Omaha, Nebraska at a salary of $43,000.00 per year (RX 9; RX 10 at p. 198). At the time of the hearing, Claimant continued to work as an investigator for Progressive Insurance in Nebraska and surrounding areas while his family remains living in Colorado (HT at pp. 58-61).

Claimant worked as a police officer and administrator for about 23 years until he decided to try working in the insurance industry in 1993 or 1994 (HT at pp. 89-91, 94-97). In 1998, Claimant accepted a job with Dyncorp as a police monitor in Bosnia where he worked on a one-year contract at a much higher wage than he had previously made (HT at pp. 101-103). Claimant worked for Dyncorp from May 27, 1998 through May 27, 1999 (CX 2; RX at p. 40). Dyncorp paid Claimant $3910.26 per month plus a 10% bonus upon completion of the twelve month contract and a $95 per day living allowance (CX 2). Upon completion of the Dyncorp contract, Claimant sought similar work for SAIC as a police instructor in Kosovo (HT at pp. 102-104). SAIC paid Claimant $6500.00 per month plus living expenses of $95 per day and $33 per day as hazardous duty pay (HT at p. 34; RX 11). Claimant reported income in 1999 of $96,469.00 and in 2000 of $95,072.00 (CX at pp. 71, 82).

Respondents voluntarily paid temporary total disability benefits to Claimant at the statutory maximum rate and provided medical treatment for Claimant's injuries from January 31, 2000 through October 23, 2000 when Claimant was released to return to his employment in Kosovo (RX 3). Additionally, Respondents paid permanent partial disability for the scheduled injury to Claimant's right knee for 47 weeks in the amount of $42,360.16 (RX 5).

II. Average Weekly Wage

Section 10 of the Act provides in pertinent part:

> Except as otherwise provided in this Act, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:
>
> (a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.
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> ...
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> (c) If either of the foregoing methods of arriving at the average annual earnings of the injured employee cannot reasonably and fairly be applied, such average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of the services of the employee in engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

Section 10 sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by 52, pursuant to Section 10(d), in order to arrive at an average weekly wage. These computation methods seek to establish a claimant's earning capacity at the time of the injury. *Johnson v. Newport News Shipbuilding & Dry Dock Co.*, 25 BRBS 340 (19920; *Lobus v. L.T.O. Corp. of Baltimore*, 24 BRBS 137 (1990); *Orkney v. General Dynamics Corp.*, 8 BRBS 543 (1978); *Barber v. Tri-State Terminals*, 3 BRBS 244 (1976), aff'd sub nom. *Tri-State Terminals v. Jesse*, 596 F. 2d 752, 10 BRBS 700 (7th Cir. 1979). There can be only one average weekly wage upon which all payments of compensation for a single injury may be based, whether the disability for which the compensation is payable is characterized as temporary or permanent, partial or total. *Thompson v. Northwest Enviro Servs.*, 26 BRBS 53 (1992); *Merrill v. Todd Pac. Shipyards Corp.*, 25 BRBS 140

(1991); *James v. Sol Salins, Inc.*, 13 BRBS 762 (1981). In computing wages, overseas allowances, including foreign housing allowance, completion awards and cost of living adjustments are included. *Denton v. Northrop Corp.*, 21 BRBS 37 (1988); *Thompson v. McDonnell Douglas Corp.*, 17 BRBS 6 (1984). Calculations under Section 10(a) look to actual wages of the injured worker but are only a theoretical approximation of what the employee could ideally be expected to earn and thus may tend to yield a higher figure than the employee actually earned. See *Duncanson-Harrelson Co. v. Director, OWCP*, 686 F. 2d 1336, 1342 (9th Cir. 1982), vacated in part on other grounds, 462 U.S. 1101 (1983). Whenever Section 10(a) cannot reasonably and fairly be applied as it would result in overcompensation to the claimant, Section 10(c) may be used to calculate average weekly wage. *Id.* Nonetheless, calculations under Section 10(a) typically best represent a claimant's earning capacity at the time of injury and disregarding a claimant's actual earnings at the time of injury should occur only in an "exceedingly rare case." *Hall v. Consolidated Equipment Systems, Inc.*,139 F. 3d 1025, 32 BRBS 91 (CRT) (5th Cir. 1998).

SAIC contends that Section 10(c) of the Act should be applied in this case arguing that Claimant's earnings for the overseas work which he performed for SAIC and Dyncorp were merely a "temporary spike" in his historical earnings. Thus, SAIC submits that the administrative law judge should apply Section 10(c) by averaging Claimant's prior history of earnings in the U.S. labor market prior to Claimant's decision to work overseas. The administrative law judge rejects this approach in this case.

Section 10(a) of the Act applies in this case because the Claimant worked in the same type of employment, albeit for two different employers, substantially the entire year preceding the injury. From January 31, 1999 through the date of injury on January 31, 2000, Claimant worked first for Dyncorp training Bosnian police officers in police techniques and then for SAIC as a police instructor. Claimant worked from January 31, 1999 until May 27, 1999 for Dyncorp. He next worked from August 9, 1999 until January 31, 2000 for SAIC. Total work time during the preceding year equals almost 42 of 52 weeks.

Accordingly, Section 10(a) applies by its very terms. SAIC argues on the one hand that Claimant could be working overseas now if he so wished yet, on the other hand, contends that Claimant is not working overseas due to a lack of available jobs. The administrative law judge notes that SAIC's own vocational expert testified that there are available jobs overseas for persons of Claimant's qualifications, both with SAIC as well as with Dyncorp (HT at pp.162-163; RX 4 at p. 153). The only real question regarding these overseas jobs is Claimant's physical capability to obtain and perform such jobs which will be addressed hereinafter. Claimant testified that although he initially accepted the one year contract with Dyncorp as a temporary measure to pay off bills, he further testified that he thereafter planned to continue working overseas for five to seven more years in order to be able to more comfortably retire following such work (HT at pp. 123-125). Claimant then accepted the two six month contracts with SAIC until this particular work played out due to downsizing (HT at pp. 122-123). Claimant is currently working hundreds of miles from his family at what appears to be a higher salary than he would be able to make in the Colorado Springs area where his family resides. Based on Claimant's current proven willingness to take higher paying work even when it means being away from his family for extended periods, the administrative law judge finds it reasonable to conclude that Claimant would still be working at higher paying overseas jobs were he still physically able to obtain and perform such jobs. Therefore, the administrative law judge will calculate Claimant's average weekly wage under Section 10(a) of the Act based upon his actual earnings during the year preceding the accident which the undersigned finds to be the best approximation of Claimant's wage earning capacity at the time of injury pursuant to *Duncanson-Harrelson Co. v. Director, OWCP, supra*.

Dyncorp paid Claimant a salary of 3910.26 per month plus a 10% completion bonus and $95 per day for living expenses. Thus, Claimant's total monthly wages at Dyncorp were $7151.28, yielding a weekly average of $1651.56. SAIC paid Claimant $6500.00 per month plus living expenses of $95 per day and hazardous duty pay of $33 per day (HT at p. 34). Claimant additionally received $587.95 per month for payment of expenses giving a total monthly wage at SAIC of $10,927.95 yielding an average weekly wage of $2523.77. Of the total of 291 days worked in the year preceding injury, Claimant worked 116 days for Dyncorp (40% of the time period) and 175 days for SAIC (60% of the time period). Applying the 40% and 60% figures to the average weekly wage at each employer yields a composite average weekly wage of $2,174.88 (40% of 1651.56 equals $660.62 plus 60% of $2523.77 equals $1514.26 for a total of $2,174.88). Accordingly, the undersigned finds that the appropriate average weekly wage figure for Claimant's injury is $2,174.88.

III. Claimant's Post-Injury Earning Capacity

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Owens v. Traynor*, 274 F. Supp. 770 (D. Md. 1967), aff'd 396 F.2d 783 (4th Cir. 1968), cert. denied 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. *Nardella v. Campbell Machine, Inc.*, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. *American Mutual Insurance Company of Boston v. Jones*, 426 F.2d 1263 (D.C. Cir. 1970).

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. *Carroll v. Hanover Bridge Marina*, 17 BRBS 176 (1985); *Hunigman v. Sun Shipbuilding & Dry Dock Co.*, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. *Bumblebee Seafoods v. Director, OWCP*, 629 F.2d 1327 (9th Cir. 1980); *American Stevedores, Inc. v. Salzano*, 538 F.2d 933 (2d Cir. 1976); *Preziosi v. Controlled Industries*, 22 BRBS 468, 471 (1989); *Elliott v. C & P Telephone Co.*, 16 BRBS 89 (1984). While claimant generally need not show that he has tried to obtain employment, he bears the burden of demonstrating his willingness to work once suitable employment is shown. *Shell v. Teledyne Movible Offshore, Inc.*, 14 BRBS 585 (1981); *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199 (4th Cir. 1984); *Wilson v. Dravo Corp.*, 22 BRBS 463, 466 (1989); *Royce v. Elrich Construction Co.*, 17 BRBS 156 (1985).

It is well-settled that the employer must show the availability of actual, not theoretical, employment opportunities by identifying specific jobs available for claimant in close proximity to the place of injury. *Royce v. Erich Construction Co.*, 17 BRBS 157 (1985). For the job opportunities to be realistic, the Respondent must establish their precise nature and terms, *Reich v. Tracor Marine, Inc.*, 16 BRBS 272 (1984), and the pay scales for the alternate jobs. *Moore v. Newport News Shipbuilding & Dry Dock Co.*, 7 BRBS 1024 (1978). While this Administrative Law Judge may rely on the testimony of a vocational counselor that specific job openings exist to establish the existence of suitable jobs, *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985), the employer's counsel must identify specific available jobs; generalized labor market surveys are not enough. *Kimmel v. Sun*

Shipbuilding & Dry Dock Co., 14 BRBS 412 (1981). The employer must establish the precise nature and terms of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and it is realistically available *Piunti v. ITO Corporation of Baltimore*, 23 BRBS 367, 370 (1990); *Thompson v. Lockheed Shipbuilding & Construction Company*, 21 BRBS 94, 97 (1988). A showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for special skills which the claimant possesses and there are few qualified workers in the local community. *P & M Crane Co. v. Hayes*, 930 F.2d 424, 430 (5th Cir. 1991).

The employer must demonstrate that the claimant "would be hired if he diligently sought the job." *Hairston v. Todd Pacific Shipyards Corp.*, 849 F.2d 1194. 1196 (9th Cir. 1988); *Fox v. West State, Inc.*, 31 BRBS 118 (1997). The ALJ must establish a precise dollar amount for post-injury wage-earning capacity. *LaFaille v. Benefits Review Bd.*, 884 F.2d 54, 61, 22 BRBS 108, 118 (CRT) (2d Cir. 1989); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339, 345-46 (1988); *Cook v. Seattle Stevedore Co.*, 21 BRBS 4, 7 (1988); *Guthrie v. Holmes & Narver, Inc.*, 30 BRBS 48, 52 (1996) rev'd on other grounds sub nom. *The Wausau Ins. Companies v. Director, OWCP*, 114 F.3d 120, 31 BRBS 41 (CRT) (9th Cir. 1997).

SAIC contends that Claimant is physically capable of performing jobs overseas similar to his employment at the time of his injury. Respondents' vocational expert, Mr. Drew, did perform a generalized labor market survey including SAIC, Dyncorp and other overseas employers. While Mr. Drew reviewed reports and deposition testimony of Dr. Ciccone for information regarding Claimant's physical restrictions, Mr. Drew did not ask Dr. Ciccone or any other physician to review the physical requirements of any of these overseas jobs and to offer an opinion as to whether or not Claimant would be physically able to perform such physical job requirements (HT at p. 179). Rather, Mr. Drew states in his report that it "appears" Claimant could physically perform such jobs based on the information available to him (RX 4 at p. 153). The undersigned finds that Mr. Drew's report on overseas job opportunities is insufficient to base a finding that Claimant could be hired for such positions in that the report does not offer the specific nature, terms and physical requirements of such jobs. Rather, the information regarding such overseas jobs is more general, vague and lacking in specific physical requirements. See *Piunti v. ITO Corporation of Baltimore*, supra; *Thompson v. Lockheed Shipbuilding & Construction Company, supra.* Considering that SAIC is one of the employers surveyed, more specific details should have been available as well as a commitment to hire Claimant for one or more of these positions with specific acknowledgment and waiver of Claimant's physical limitations. No such specific commitment by SAIC has been offered. The only assurance offered by SAIC was that Claimant "could apply" (HT at pp. 177-178).

Dr. Ciccone, II set forth specific physical limitations for Claimant including lifting and carrying no more than 10 pounds, walking and standing no more than 2 hours per day, and no pushing, pulling, kneeling, squatting, climbing or reaching above the shoulders (CX 4 at pp. 128-129). Indeed, Mr. Drew's initial report noted that these restrictions limited Claimant to sedentary to light work which would prevent him from doing "active police and security" work and may require some modification or accommodation from any potential employer (CX 4 at p. 161). The overseas jobs discussed by Mr. Drew apparently require either a fairly strenuous physical testing, for example to work for Dyncorp, or at least a medical examination with certification by a physician that the individual is physically capable of performing the overseas job, as in the case of SAIC (RX 14 at pp. 26, 32). While SAIC has not furnished specific physical qualifications required for overseas jobs, a medical examination apparently is

required (RX 14 at p. 32). Claimant further testified that when he returned to work for SAIC following his recovery from his injuries, his job was modified due to his physical limitations (RX 12 at pp. 77-83; HT at pp. 44-48). Claimant further testified that without such modification, he would have been unable to perform his duties as they were required of him prior to the accident (HT at pp. 41-44). Claimant's testimony that his work became more administrative upon his return is corroborated by the testimony of Mr. Dennis Carter(RX 14 at pp. 19-21). Further, Mr. Carter also confirms that while Claimant was a good worker, Mr. Carter did notice that even walking up several flights of stairs seemed to cause Claimant some problem (RX 14 at pp.22, 35, 37).

Based on the credible testimony of Claimant, the physical limitations set forth by Dr. Ciccone essentially restricting Claimant to sedentary to light work, and the lack of specific job information, or more precisely, the lack of information regarding physical requirements for obtaining and performing overseas jobs and particularly overseas jobs for SAIC, I find that Claimant is not physically capable of performing his pre-injury work as an overseas police instructor.

With respect to Claimant's present employment as an investigator for Progressive Insurance, I find that such employment represents Claimant's post-injury earning capacity. Claimant showed good initiative in competing for and obtaining this position once it was made known to him by Mr. Drew. While Mr. Drew has identified a few possible positions that Claimant may compete for at possibly higher rates of pay, the overwhelming majority of these suggested jobs are at the same or lower salary range and do not appear to fit in with Claimant's job qualifications as well as his current position with Progressive Insurance. Indeed, Mr. Drew acknowledges that Claimant's current job is within the expected average range of salary among jobs which Claimant could expect to find within the U.S. (HT at p. 169). Further, Claimant should be commended for his continued attempts to find work including his work previously for the Aurora Police Department as a dispatcher. Claimant is employed currently at an annual salary of $43,000 yielding an average weekly wage of $826.93. Accordingly, claimant has suffered a permanent partial disability loss of $1347.95 per week yielding a compensation rate since his employment with Progressive Insurance of $898.63 per week.

IV. Scheduled Award for Right Lower Extremity

Section 8(c) of the Act sets forth a schedule for automatic entitlement to an award based on the injury alone without proof of any loss of wage earning capacity. See *Travelers Ins. Co. v. Cardillo*, 225 F. 2d 137 (2d Cir. 1955), cert. denied 350 U.S. 913 (1955). The judge must determine the degree of disability based upon medical evaluations plus the claimant's own descriptions of the symptoms and physical effect of the injury. *Amato v. Pittston Stevedoring Corp.,* 6 BRBS 537 (1977). The assessment of disability by the judge is within his discretion as there is no particular formula to be applied. *Petersen v. Washington Metro. Transit Auth.*, 13 BRBS 891, 897 (1981). The judge may consider the AMA Guide for evaluation of disability but is not bound to adhere to such Guide. *Ortega v. Bethlehem Steel Corp.*, 7 BRBS 639 (1978).

On March 21, 2001, William J. Ciccone, Jr. (the father of Claimant's treating physician, Dr. Ciccone, II) rated Claimant's shoulder and knee impairments at 22% of the whole person applying AMA Guides 3rd Edition Revised (CX 3 at p. 124). On March 26, 2001, Dr. Ciccone, Jr. reworked his impairment rating to the knee finding

7% to the whole person (CX 4 at p. 126). On May 11, 2001, Dr. Ciccone, Jr. again amended his figure to an 18% impairment of the lower extremity (CX 3 at p. 125). On September 5, 2002, claimant saw Dr. Hendrick J. Arnold, a board certified orthopedic surgeon for further evaluation of his disabilities. Dr. Arnold interviewed and examined claimant. He thereafter issued a lengthy and thorough report in which he concludes that claimant's disability of the right lower extremity should be rated at 38% (CX 3 at pp. 87-121). In reviewing the opinions of Drs. Arnold and Ciccone, Jr., it appears that virtually all of the 20% larger rating given by Dr. Arnold is attributable to Dr. Arnold assigning a 20% disability relating to vascular problems due to persistent swelling from claimant's deep venous thrombosis ((CX 3 at p. 106). The continued swelling of the right leg was apparently not contemplated by Dr. Ciccone, but is borne out by claimant's testimony at the hearing (HT at p. 51). Accordingly, based on the more recent and thorough report of Dr. Arnold as well as the testimony of claimant regarding continuing problems with the right leg, I find that claimant is entitled to an award equivalent to 38% of the scheduled award for the right lower extremity.

V. Disfigurement Award for Facial Scar

Section 8(c)(20) of the Act provides for an award for disfigurement for serious injury to the body which might hinder a worker in efforts to obtain or maintain employment. However, in the case of disfigurement to the head, face or neck, such disfigurement need not be shown to have an effect on employment. *Schreck v. Newport News Shipbuilding & Dry Dock Co.*, 10 BRBS 611 (1978); *Woodham v. U.S. Navy Exch.*, 2 BRBS 185 (1975). With respect to facial disfigurement, the judge must find that the scar is "serious" in order to make an award. *Brysiak v. Sun Shipbuilding & Dry Dock Co.*, 2 BRBS 197 (1975); *Skipper v. Jacksonville Shipyards*, 1 BRBS 533 (1975), rev'd on other grounds sub nom. *Jacksonville Shipyards v. Perdue*, 539 F. 2d 533 (5th Cir. 1976), vac'd sub nom. *Director, OWCP v. Jacksonville Shipyards*, 433 U.S. 904 (1977).

The administrative law judge finds that claimant's scar near his left eye is not serious and is thus not compensable. The undersigned has reviewed the photographs of claimant's face and examined the claimant's facial scar at the hearing (CX 5 at pp. 166-167; HT at pp. 32-33). The minor nature and slight visibility of this scar has led the undersigned to the conclusion that the scar is not significant and accordingly, is not compensable.

VI. Section 14(e) Penalty

Claimant contends that Respondents are liable for the 10 per cent penalty imposed by Section 14(e) of that Act contending that more than 14 days elapsed between final payment by Respondents and the filing of a Notice of Controversion. The Form LS-208 filed by Respondents indicates in block 12 that the last payment of compensation made by Respondents was on February 8, 2002. However, block 14 indicates that permanent partial disability payments were made to February 13, 2001. The Post Trial Brief of Respondents notes that this notation in block 14 was a typographical error and that the proper date should be February 13, 2002. The Notice of Controversion, Form LS-207, was filed on February 25, 2002. Since claimant's disability payments were paid until February 13, 2002, and the Notice of Controversion was filed 11 days later on February 25, 2002, Respondents are not subject to the Section 14(e) penalty in this case.

VII. Computation of Benefits Owed

Employer paid to claimant temporary total disability benefits at the statutory maximum rate of $901.28 per week from January 31, 2000 through October 23, 2000, totaling $34,377.39 (RX 3). Employer thereafter paid claimant permanent partial disability benefits based on the scheduled injury to the right leg at the rate of $901.28 per week for 47 weeks from March 22, 2001 through February 13, 2002, totaling $42,360.16 (RX 3). Claimant returned to work for Employer from November 3, 2000 until November 2, 2001. I find that Employer owes scheduled permanent partial disability benefits for the right leg at the rate of $901.28 per week commencing March 22, 2001, for a total of 109.44 weeks (38% of 288 weeks). Since scheduled and unscheduled compensation payments run concurrently and may not together exceed the statutory maximum compensation rate per week, Employer owes permanent partial disability compensation at the rate of $898.63 per week after the 109.44 weeks have run since such date occurs following Claimant's return to work for Progressive Insurance. See *I.T.O. Corp. Of Baltimore v. Green*, 185 F. 3d 239 (4th Cir. 1999), 33 BRBS at 151 (CRT). Employer should be credited with the $42,360.16 in payments which it has made as set forth above.

VIII. Interest

Claimant is entitled to interest on any accrued unpaid compensation benefits. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556, 559 (1978), *aff'd in part, rev'd in part sub nom., Newport News Shipbuilding & Dry Dock Company v. Director, OWCP*, 594 F. 2d 986 (4th Cir. 1979). Interest is mandatory and cannot be waived in contested cases. *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992); *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833 91982); *MacDonald v. Sun Shipbuilding & Dry Dock Co.*, 10 BRBS 734 (1978). Accordingly, interest on the unpaid compensation amounts due and owing by the Employer should be included in the District Director's calculations of amounts due under this decision and order.

IX. Attorney's Fees and Costs

Thirty (30) days is hereby allowed to claimant's counsel for the submission of such an application. See 20 C.F.R. 702.132. A service sheet showing that service has been made upon all the parties, including the claimant, must accompany this application. The parties have fifteen (15) days following the receipt of any such application within which to file any objections.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations may be administratively calculated by the District Director.

It is therefore **ORDERED** that:

1) Employer shall pay to the claimant compensation for his scheduled right leg injury as permanent partial disability the amount of $901.28 per week commencing on March 22, 2001, for a period of 109.44 weeks and shall thereafter pay to the Claimant compensation for his unscheduled shoulder injury the amount of

$898.63 per week, with a credit given for Employer's payments of $42,360.16, plus interest on accrued unpaid amounts due.

2) Pursuant to Section 7 of the Act, Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the claimant's work-related injuries may require, subject to the provisions of Section 7 of the Act.

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Russell D. Pulver
Administrative Law Judge